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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

RON PAIR ENTERPRISES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether Section 506(b) of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) entitles a creditor to receive post-petition interest on an oversecured claim allowed in a bankruptcy proceeding.

EDITOR'S NOTE

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v.

RON PAIR ENTERPRISES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 828 F.2d 367. The opinion of the district court (App., *infra*, 15a-16a) and the opinions of the bankruptcy court (App., *infra*, 17a-19a, 20a-25a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 13a-14a) was entered on September 4, 1987. On November 24, 1987, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including December 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 506 of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) is set out in a statutory appendix (App., *infra*, 25a).

STATEMENT

1. Section 506 of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) concerns the treatment of secured claims in bankruptcy proceedings. Section 506 was enacted, together with the rest of the Bankruptcy Code, in the comprehensive overhauling of the bankruptcy laws accomplished by the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Section 506(b) addresses the situation of an "oversecured claim," i.e., the situation where the value of the security exceeds the amount of the allowed secured claim (and certain administrative costs of preserving or disposing of the property for the creditor's benefit). In the case of an oversecured claim, "there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" (11 U.S.C. (Supp. IV) 506(b)).

2. On May 1, 1984, respondent petitioned the United States Bankruptcy Court for the Eastern District of Michigan for a reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (& Supp. IV) 1101 *et seq.* The government filed a timely proof of claim for $53,278 in assessed and unpaid withholding and social security taxes, penalties, and interest that had accrued prior to the filing of the petition in bankruptcy. The claim was secured by tax liens on property owned by respondent for which notice had been properly filed. The parties stipulated that the value of the collateral securing the tax claim was sufficient to pay this claim, along with any post-petition interest that was due on the claim. App., *infra*, 2a.

On October 1, 1985, respondent filed its First Amended Plan of Reorganization. This plan provided for the payment of the government's claim, including the portion allocable to pre-petition interest, but it did not provide for the payment of post-petition interest on that claim. The government filed a timely objection to the plan, arguing, inter alia, that Section 506(b) entitled it to receive post-petition interest on its oversecured claim. App., *infra*, 2a.

3. On December 6, 1985, the bankruptcy court denied the government's objection and ordered that the plan, which had previously been confirmed (see App., *infra*, 20a-25a), could be completed without payment of post-petition interest to the government (*id.* at 17a-19a). The court relied upon several "pre-Code" court of appeals decisions decided under the prior statute (Bankruptcy Act of 1898, ch. 541, 30 Stat. 544), noting that it saw "no reason to deviate from the sound reasoning of the various Courts of Appeal [*sic*] that have already disposed of this issue" (App., *infra*, 18a). These cases had held that the Bankruptcy Act did not require the payment of post-petition interest on nonconsensual liens, i.e., liens that were not voluntarily established by the debtor, such as a federal tax lien. See, *e.g.*, *United States* v. *Harrington*, 269 F.2d 719, 724 (4th Cir. 1959).

The district court reversed (App., *infra*, 15a-16a). The court held that "the plain language of Section 506(b) entitles the United States to such post-petition interest" (App., *infra*, 16a). The court further stated that this interpretation had been upheld in *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986), and *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985) (App., *infra*, 16a).

4. The court of appeals reversed and reinstated the order of the bankruptcy court (App., *infra*, 1a-12a), holding that Section 506(b) does not require that post-petition interest be paid on oversecured claims founded upon nonconsensual liens. The court found that the

language of Section 506(b) was not so unambiguous as to preclude further inquiry (App., *infra*, 4a). Citing *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), the court stated that the Bankruptcy Code provision should be interpreted with reference to pre-Code law "in order to better understand the context in which the provision was drafted and therefore the language itself" (App., *infra*, 4a-5a). In this case, the court explained, judicial decisions under the Bankruptcy Act had established the rule that post-petition interest was not available on nonconsensual liens because the creditor had not bargained for the security (*id.* at 5a-7a). The court concluded that, in the absence of any affirmative indication in the legislative history that Congress intended to depart from existing case law, Section 506(b) should be interpreted as "codif[ying] the pre-Code law on the issue of allowable post petition interest" (App., *infra*, 10a). The court acknowledged that its "interpretation results in a conflict with the Fourth Circuit and with many bankruptcy courts" (*ibid.* (footnote omitted)).[1]

REASONS FOR GRANTING THE PETITION

The court of appeals has decided a significant bankruptcy law issue in a manner that directly conflicts with the decision of another court of appeals. Moreover, the court's decision is erroneous because it unjustifiably disregards the plain language of the governing statute, Section 506(b) of the Bankruptcy Code. The question presented is a frequently-recurring one that is of considerable administrative importance. Accordingly, it is appropriate for this Court to grant certiorari in order to eliminate the uncertainty and disparity in treatment in different circuits that has been created by the court of appeals' error.

[1] The Sixth Circuit disavowed as dicta its prior statement that Section 506(b) "provides for interest on all allowed secured claims where the value of the security is greater than the claim" (*In re Colegrove*, 771 F.2d at 122). App., *infra*, 4a n.2.

1. As the court of appeals frankly acknowledged (App., *infra*, 10a), its decision directly conflicts with *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986). The facts in *Best Repair* were essentially indistinguishable from those of the instant case. The government filed a timely proof of claim in a Chapter 11 proceeding for delinquent taxes, and the debtor acknowledged its liability and the fact that the value of the property securing the federal tax claim exceeded the total amount claimed by the government. The government and the debtor disagreed, however, on whether Section 506(b) required the payment of post-petition interest to the government since the claim was oversecured. The debtor contended that the statute should be interpreted as a codification of pre-Code law by reading the statutory allowance of post-petition interest for oversecured claims as limited to interest "provided for under the agreement under which such claim arose" (§ 506(b)).[2] The Fourth Circuit, however, flatly rejected this contention.

The court in *Best Repair* held that the debtor's argument "strains the plain meaning of the language and grammar of the provision" (789 F.2d at 1082). The court explained that the phrase "interest on such claim" was set off—by

[2] As we have noted (page 3, *supra*), several court of appeals decisions under the old Bankruptcy Act had followed the rule that post-petition interest could be recovered on oversecured claims only where the liens were consensual, which would not include federal tax liens. See *In re Boston & Maine Corp.*, 719 F.2d 493 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984); *In re Kerber Packing Co.*, 276 F.2d 245 (7th Cir. 1960); *United States* v. *Mighell*, 273 F.2d 682 (10th Cir. 1959); *United States* v. *Bass*, 271 F.2d 129 (9th Cir. 1959); *United States* v. *Harrington*, *supra*.

both a comma and a connecting conjunction—from the later list of other items covered by an agreement between the parties. "The effect of this usage," the court continued, "is to make 'interest on such claim' a separate and distinct clause to which 'provided for under the agreement' does not apply" (*ibid.*). The court concluded that "the natural meaning of [Congress's] chosen words is to permit post-petition interest on nonconsensual oversecured claims" (*ibid.* (footnote omitted)). The court added that the legislative history provided "no reason to depart from the natural import of the language itself" (*ibid.*). Thus, the decision below and the decision in *Best Repair* are irreconcilable, and they will lead to disparate results in the Fourth and Sixth Circuits whenever the government holds an oversecured tax claim in a Chapter 11 proceeding.

In addition, as the court of appeals also acknowledged, the decision below conflicts with the decisions of "many bankruptcy courts" (App., *infra*, 10a (footnote omitted)).[3] This conflict is not restricted to tax lien cases. The opinion below does not suggest that the result turns on the fact that the claimant is the government or that the claim involved is for delinquent taxes. Rather, the court of appeals quite explicitly held that Section 506(b) should be read to embody pre-Code law and that post-petition interest cannot be collected on an oversecured claim unless the interest was "provided for under the agreement under which [the] claim arose" (§ 506(b)). Thus, the decision below also conflicts with the decisions of numerous bankruptcy courts

[3] Several bankruptcy courts have awarded post-petition interest on claims oversecured by tax liens, for both federal (see, *e.g.*, *In re Gilliland*, 67 Bankr. 410 (Bankr. N.D. Tex. 1986); *In re Hoffman*, 28 Bankr. 503, 508 (Bankr. D. Md. 1983)) and state and local taxes (see, *e.g.*, *In re Brandenburg*, 71 Bankr. 719 (Bankr. D.S.D. 1987); *In re Busone*, 71 Bankr. 201 (Bankr. E.D.N.Y. 1987); contra *In re Granite Lumber Co.*, 63 Bankr. 466 (Bankr. D. Mont. 1986); *In re Venable*, 48 Bankr. 853 (S.D.N.Y. 1985)).

that have permitted private nonconsensual lienholders, such as judgment lien creditors and mechanic's lien claimants, to collect post-petition interest under Section 506(b). See, *e.g.*, *In re Charter Co.*, 63 Bankr. 568 (Bankr. M.D. Fla. 1986); *In re Romano*, 51 Bankr. 813 (Bankr. M.D. Fla. 1985); *In re Morrissey*, 37 Bankr. 571 (Bankr. E.D. Va. 1984); *In re Bormes*, 14 Bankr. 895 (Bankr. D.S.D. 1981); see also *In re Loveridge Machine & Tool Co.*, 36 Bankr. 159, 162 (Bankr. Utah 1983); contra, *In re Dan-Ver Enterprises*, 67 Bankr. 951 (W.D. Pa. 1986).

2. a. The decision of the court of appeals mistakenly fails to apply the plain terms of the statute. The basic rule of statutory construction is that the plain meaning of a statute should be followed, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). See also, *e.g.*, *United States* v. *Clark*, 454 U.S. 555, 560 (1982); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). This is not one of these rare cases. Rather, the court of appeals departed from the apparent meaning of the statutory language without any substantial basis for believing that the plain meaning did not reflect the intention of Congress.

The natural reading—indeed, the only facially plausible reading—of Section 506(b) is that it permits all holders of oversecured claims to collect post-petition interest and, in addition, reasonable fees and costs provided for in the agreement giving rise to the claim. The authorization to pay interest on the claim is designed to stand independently; it is separated from the remaining portion of the statute both by a comma and by the conjunctive phrase "and any," which introduces a second category of payments allowed to the holders of oversecured claims. The concluding phrase—"provided for under the agreement"—cannot plausibly be read as modifying anything more than

the immediately preceding list of payments, *i.e.*, "reasonable fees, costs, or charges." The court of appeals' proffered construction that the "provided for" phrase is a limitation on the interest award tortures the structure of the provision and amounts to an "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists" (*Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984)).

The fact that pre-Code decisional law had set forth a different rule from that indicated by the language of Section 506(b) provides no reason to question whether that language faithfully embodies congressional intent. The Bankruptcy Code was designed as a comprehensive revision of the substantive and procedural law governing bankruptcy proceedings. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982). Congress stated (H.R. Rep. 95-595, 95th Cong., 1st Sess. 3 (1977) (footnotes omitted)):

> The major purpose of this bill is the modernization of the bankruptcy law. The substantive law of bankruptcy and the current bankruptcy system was designed in 1898, in the horse and buggy era of consumer and commercial credit, and was last overhauled in 1938, nearly 40 years ago.

Extensive consideration was given both to tax collection in bankruptcy proceedings and to the treatment of secured claims. Since the motivation for the comprehensive bankruptcy reform was to *change* the law, there is no reason to assume that this major revision intended to retain decisional law under the old regime.

This is particularly true with respect to the oversecured claim issue presented here. One of Congress's goals in enacting the new Bankruptcy Code was to strike a balance between the competing interests of debtors, private creditors, and the government as a tax collector. See S.

Rep. 95-989, 95th Cong., 2d. Sess. 14 (1978); S. Rep. 95-1106, 95th Cong., 2d Sess. 2 (1978). Given the substantial changes in commercial lending practices following the adoption of the Uniform Commercial Code in the 1960s and the modernization of the treatment of federal tax liens in the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, Congress would have been expected to strike a different balance in the Bankruptcy Code from that found in Bankruptcy Act case law that antedated these changes.

Indeed, the changes wrought by the modernization of commercial practices have almost entirely eviscerated the reasons given by the court below, and by the earlier decisions that it followed, to justify a ban on payment of post-petition interest to the holders of nonconsensual oversecured claims. For example, one of the reasons given by the court of appeals for the rule it adopted is that the government should not be entitled to post-petition interest because a tax lien is a general lien that encumbers all property belonging to the taxpayer, while a private creditor's lien reaches only a single asset (App., *infra*, 7a). See also, *e.g.*, *In re Kerber Packing Co.*, 276 F.2d 245, 247 (7th Cir. 1960); *United States* v. *Bass*, 271 F.2d 129, 131-132 (9th Cir. 1959). While this distinction might have been valid when it was first suggested, under modern commercial lending practices it is no longer the case that private lienholders limit their security to a single asset. See, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70, 71 (1982); *In re American Mariner Indus., Inc.*, 734 F.2d 426, 427 (9th Cir. 1984) (bank loan secured by security interest in "basically all of the [debtor's] assets").

The court's other rationale for its rule—that allowing interest to the holders of oversecured claims unfairly disadvantages general unsecured creditors who have no power to compel the debtor to pay its taxes in a timely fashion (see App., *infra*, 7a n.6; *In re Boston & Maine Corp.*, 719 F.2d 493, 497 (1st Cir. 1983), cert. denied, 466 U.S. 938

(1984))—has similarly been weakened by more recent developments. The government now must file notice of its tax lien in order to become a secured creditor, and unsecured creditors have the opportunity to discover the tax liens and to choose to withhold credit if they cannot obtain adequate security. The government, on the other hand, is an "involuntary creditor" that lacks the ability easily to enforce collection or to prevent further extensions of "credit" in the form of additional unpaid withholding taxes. See generally H.R. Rep. 95-595, 95th Cong., 1st Sess. 189-193 (1977); *id.* at 193 ("it is a frequent occurrence that the business will stop paying its taxes before it stops paying its other creditors because the officers of a business know that detection of nonpayment is more difficult for the taxing authority than it is for the supplier or lender, and that an unpaid supplier quickly stops shipping goods, though an unpaid taxing authority is usually unable to take collection action for months").

In sum, no rational congressional purpose would be served by reading Section 506(b) to embody pre-Code law, in defiance of its plain meaning.

b. The court of appeals relied on no legislative history or other evidence that would even suggest that the plain meaning of Section 506(b) does not reflect the intent of Congress, much less evidence that would show that this is one of of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" (*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 571). Instead, the court relied on two recent decisions of this Court for what it viewed as a general rule of construction—namely, that a provision of the Bankruptcy Code should be assumed to embody pre-Code decisional law in the absence of a very explicit indication by Congress of an intent to abandon that prior decisional law. The court erred both in deducing such a general rule of construction from these cases and in

applying it here. Both of the cases relied upon concerned the effect of a general bankruptcy provision on important issues and policies outside the bankruptcy context. Because it appeared likely that Congress had not considered these nonbankruptcy issues in the bankruptcy revision, it was not unreasonable for the Court to look to pre-Code law, among other things, in an attempt to divine congressional intent. But those cases have little bearing here where the Bankruptcy Code provision is specifically addressed to the issue at hand, and that issue is a core bankruptcy matter. In short, there is simply no basis for concluding that pre-Code decisional law is embodied in Section 506(b).

In *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), the Court held that the Bankruptcy Code's provision generally authorizing the trustee to abandon property (11 U.S.C. (Supp. IV) 554(a)), did not give him the right to abandon property in contravention of state or local laws designed to protect public health or safety. The Court explained that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety" (474 U.S. at 502). Indeed, the Court stated, Congress has "repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law," especially when issues of public health and safety are involved (*ibid.*). The Court also stated that there had been well-recognized restrictions on the trustee's abandonment power when Congress enacted Section 554(a) (474 U.S. at 500-501). Characterizing Section 554 as a "codif[ication of] the judicially developed rule of abandonment," the Court further stated that it was a normal rule of statutory construction, particularly in bankruptcy codifications, that Congress makes its intent specific if it intends to

change the interpretation of a judicially created concept (474 U.S. at 501). Finding that the exemption from state law sought by the trustee was an "extraordinary" one (*ibid.*), the Court concluded that an intent to establish such an exemption would have been expressly manifested by Congress.

In *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), the Court held that the Bankruptcy Code did not provide for the discharge of restitution obligations to crime victims ordered by the state's criminal justice system. Citing *Midlantic*, the Court noted that the 1978 Code provision, which did not on its face make such obligations non-dischargeable, was enacted "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders" (slip op. 9-10). The Court explained that this judicial exception had been established in the face of relatively "clear statutory language" (*id.* at 8) that would have rendered such debts dischargeable, and therefore it was reasonable to read the 1978 statute as embodying the same exception, rather than silently clashing with the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings" (*id.* at 10).

The Court did not purport in these cases to establish a general rule that the Bankruptcy Code necessarily must be construed to preserve pre-Code judicial rules in the absence of a specific statement of contrary congressional intent. Indeed, that proposition cannot be squared with this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). The Court there held that, with respect to property seized by levy to satisfy a federal tax lien, the government, just like other secured creditors, is subject to the general requirement of 11 U.S.C. 542(a) that it turn over secured property to the bankruptcy trustee. The Court recognized (*Phelps* v. *United States*, 421 U.S. 330 (1975)) that pre-Code law had held that property

seized by the IRS pursuant to a levy was not subject to the bankruptcy court's jurisdiction (see 462 U.S. at 206 n.13). But the Court in *Whiting Pools* held that this previously-established limitation was now "irrelevant because of the expanded jurisdiction of bankruptcy courts under the Bankruptcy Code" (*id.* at 210 n.18). The Court explained that "[t]he Service is bound by § 542(a) to the same extent as any other secured creditor" and that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien" (462 U.S. at 209). By the same token, however, nothing in the Bankruptcy Code or the legislative history had indicated an intent to overrule *Phelps*. The Court thus rejected the premise that pre-Code judicial law is assumed to have been embodied in the Bankruptcy Code in the absence of a specific contrary statement by Congress.

In sum, *Midlantic* and *Kelly* do not establish any general presumption that the Bankruptcy Code embodies pre-Code judicial law; rather, they simply hold that pre-Code law was relevant in the circumstances of those cases. This case, however, differs from *Midlantic* and *Kelly* in several important respects. Those cases involved the effect of a fairly general bankruptcy law provision upon a question implicating important governmental interests unrelated to bankruptcy—state health and safety laws and the continued effectiveness of requirements imposed in state criminal proceedings—that were not the focus of congressional attention during the drafting of the Bankruptcy Code. The issue here, by contrast, relates only to a core matter of bankruptcy – the extent of distributions to secured creditors in bankruptcy proceedings (see 28 U.S.C. (Supp. III) 157(b)(2)(B)). The resolution of this issue depends upon the balance struck among the interests of competing creditors in bankruptcy proceedings, which

was one of the principal issues considered by Congress in 1978.[4] Moreover, the statute here is specifically directed at the question of recovery of post-petition items arising from oversecured claims. In contrast to *Midlantic* and *Kelly*, the rule adopted by the court of appeals cannot be regarded as remedying what may have been a minor oversight in the statute on an issue upon which Congress did not focus its attention; rather, the court of appeals' decision is directly antithetical to what Congress explicitly said about an issue that was the very subject of the relevant provision.

Thus, the exceptional circumstances that induced the Court to depart in *Midlantic* and *Kelly* from what the statute standing alone appeared to suggest are absent here. Rather, as in *Whiting Pools*, the language of the new statute should be construed in accordance with normal rules of statutory construction, not by adopting decisional law developed under the old statute. Congress here enacted a major change in the bankruptcy laws and specifically addressed a particular issue in broad language that covers the government's tax claim. There is no suggestion in the legislative history that the federal government (or other nonconsensual lienholders) should be excepted from the statute. Accordingly, there are no exceptional circumstances present that could justify departing from the plain meaning of the statute — the specific terms of

[4] The House Report on the 1978 Act noted in its overview of the bill (H.R. Rep. 95-595, 95th Cong., 1st Sess. 4-5 (1977) (footnote omitted)):

> This is not primarily a debtor's bill * * *. The bill codifies creditors' rights more clearly than the case law, which is in many ways just developing. It defines the protections to which a secured creditor is entitled, and the means through which the court may grant that protection.

which clearly indicate that Congress did not intend to retain pre-Code decisional law on the question at issue.[5]

3. The conflict in the circuits created by the decision below warrants this Court's attention because the question presented is one of considerable importance to the administration of the bankruptcy laws. Most bankruptcies involve secured claims, often including claims in which the value of the security exceeds the amount of the claim. The Internal Revenue Service's statistics show that, during the 1982-1986 period, the IRS filed secured claims in bankruptcy proceedings totalling more than $730 million, including $186 million in 1986 alone. While the figures do not indicate the precise amount of these claims that were oversecured, the number is plainly substantial. Moreover, the issue presented here affects not only oversecured claims filed by the federal government, but also those filed by state and local governments and by private creditors whose liens are nonconsensual. Clearly, a uniform nationwide rule is required on an issue that recurs so frequently, and the Court therefore should act to resolve the conflict in the circuits.

[5] Indeed, even under the court of appeals' reading, Section 506(b) cannot be said to embody pre-Code law. Under prior law, the question whether attorney's fees provided for in the agreement would be allowed was governed by state law. Section 506(b), however, does not include this state law requirement. See *Unsecured Creditors' Comm.* v. *Walter E. Heller & Co.*, 768 F.2d 580, 582-585 (4th Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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DECEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-1785

IN RE: RON PAIR ENTERPRISES, INC., DEBTOR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RON PAIR ENTERPRISES, INC. d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Eastern District of Michigan

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Decided and Filed September 4, 1987

Before: KENNEDY and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge.

Debtor Ron Pair Enterprises, Inc. appeals from the district court's order awarding postpetition interest on an oversecured prepetition federal tax lien. The district court, in reversing the bankruptcy court's ruling, held that section 506(b) of the 1978 Bankruptcy Code, 11 U.S.C. § 506(b), provides for the payment of such interest by its plain terms. We conclude that the language of section 506(b) does not clearly provide for the payment of such interest and, in fact, it fails to explicitly overrule the pre-

Code judicially created concept disallowing the payment of postpetition interest on nonconsensual prepetition oversecured claims. We therefore reverse the judgment of the district court.

I.

Debtor filed a bankruptcy petition pursuant to Chapter 11 of the Bankruptcy Code on May 1, 1984, in the United States Bankruptcy Court for the Eastern District of Michigan. The Government filed timely proof of a prepetition claim in the amount of $53,277.93, comprised of assessments for unpaid withholding and social security taxes, penalties and prepetition interest. The Government's claim was properly perfected through a tax lien.

Debtor's First Amended Plan of Reorganization was filed on October 1, 1985. The Plan provided for the payment of the Government's prepetition tax claim, including prepetition interest which had accrued on that claim, but it did not provide for the payment of postpetition interest on that claim. Accordingly, the Government filed a timely objection to the Plan claiming, among other things, that section 506(b) of the 1978 Bankruptcy Code allows for the payment of postpetition interest since the assets securing the Government's claim exceeded the amount of the principal debt.[1] A hearing was held before the Bankruptcy Court on December 3, 1985, at which time the parties stipulated that the collateral securing the Government's claim was adequate to pay that claim as well as postpetition interest on that claim; in other words, they stipulated that the claim was oversecured.

[1] There is no indication in the record regarding which portions of Debtor's estate the Government's tax lien attaches, nor the value of specific pieces of property or the claims made on those pieces of property. However, it is not uncommon for tax liens to attach to all parcels of real estate owned by a debtor.

On December 6, 1985, the Bankruptcy Court denied the Government's objection, concluding that section 506(b) did not authorize the payment of postpetition interest on the Government's prepetition tax claim. The district court reversed the Bankruptcy Court's judgment on June 30, 1986, concluding that the "plain language" of section 506(b) entitled the Government to such interest, relying on the Fourth Circuit's decision in *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986), and this court's decision in *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985). This timely appeal followed.

II.

The sole issue before this court is whether section 506(b) of the 1978 Bankruptcy Code, 11 U.S.C.§ 506(b), authorizes the payment of postpetition interest on an oversecured prepetition claim when that claim is nonconsensual in nature. Section 506(b) provides in full:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges *provided for under the agreement under which such claim arose.*

(Emphasis added). Debtor argues that the emphasized clause above modifies both "interest on such claim" as well as "any reasonable fees, costs, or charges," thereby codifying the judicially created pre-Code rule regarding postpetition interest on oversecured prepetition claims. Debtor asserts that there is no indication that Congress intended to deviate from the judicially created rule that postpetition interest could not be awarded on nonconsensual prepetition claims, arguing that the language in section 506(b) is

too ambiguous to be considered an explicit departure from a well-established doctrine.

The Government counters by arguing that the language of section 506(b) is unambiguous in that the emphasized clause above only modifies "any reasonable fees, costs, or charges." The Government relies on the fact that the phrase "interest on such claim" is set off by commas and is followed by the words "and any," indicating that interest is to be treated differently from fees, costs, or charges. The Government argues that since the language is unambiguous and allows for postpetition interest to be awarded on any allowed secured prepetition claim regardless of whether it is consensual or not, this Court should not refer to pre-Code law to interpret section 506(b). The Government suggests further that even if this Court is inclined to review pre-Code law, the punctuation, phraseology and grammatical structure of section 506(b) plainly and unambiguously express Congress' intent to depart from pre-Code law. This is a case of first impression in this Circuit.[2]

We first reject the Government's contention that pre-Code law should not be relied on in interpreting section 506(b) since the provision appears to be unambiguous. While the language of a statute is always the starting point when its construction is at issue, *see Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), it is only the starting point. As in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755 (1986), and *Kelly v. Robinson*, 107 S. Ct. 353 (1986), pre-Code law should be reviewed in order to better understand the context in which the provision was

[2] Although *In re Colegrove*, 771 F.2d 119, 122 (6th Cir. 1985), stated that § 506(b) "provides for interest on all allowed secured claims where the value of the security is greater that the claim," that statement was dicta since the court was clearly not presented with the issue with which we are currently confronted.

drafted and therefore the language itself. *Midlantic*, 106 S. Ct. at 759-60; *Kelly*, 107 S. Ct. at 358.[3] In fact,

> [t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judically created concept, it makes that intent specific. *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.*

Midlantic, 106 S. Ct. at 759-60 (emphasis added) (citation omitted). *See also Kelly*, 107 S. Ct. at 358-61 & n.12 (Congress was not permitted to "silently abrogate" a judicially created bankruptcy rule).[4] We believe, therefore, that in order to determine if section 506(b) changed the interpretation of a judicially created rule, we must first understand that rule and its origins.

Under pre-Code bankruptcy law, it was a well-established general rule that interest on both secured and unsecured prepetition claims ceased to accrue upon the filing of a bankruptcy petition. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 163 (1946); *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911). This general rule applied to tax liens, *City of New York v. Saper*, 336 U.S.

[3] *See also Watt v. Alaska*, 451 U.S. 259, 266 (1981) (the "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' ") (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1982)) (citations omitted).

[4] In both *Midlantic* and *Kelly*, the Court reviewed the pre-Code judicially created doctrine before analyzing the statutory language itself. While the Government maintains that the rule of statutory construction enunciated in these two cases only applies if there is some overriding public policy for the doctrine itself, we find no support for that position. Rather, if there is a well-established principle in bankruptcy law, we believe *Midlantic* and *Kelly* come into play, requiring Congress to explicitly set forth its intention to deviate from the judicially created rule.

328, 337-38 (1949); *United States v. Mighell*, 273 F.2d 682 (10th Cir. 1959), and had its foundation primarily in the equitable principle that the delays necessitated by bankruptcy proceedings should not place one creditor at an advantage or disadvantage in contrast to other creditors:

> In the context of interest-bearing debts, the equitable principle enunciated in *Sexton* and *Saper* rests at bottom on an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings, obligations bearing relatively high rates of interest were permitted to absorb the assets of a bankrupt estate whose funds were already inadequate to pay the principal of the debts owed by the estate.

Nicholas v. United States, 384 U.S. 678, 683-84 (1966) (footnote omitted).

Over time, the federal courts created exceptions to this general rule to allow for postpetition interest on prepetition secured claims under the following circumstances: (1) the debtor is proven to be solvent; (2) the property held by the creditor to secure the debt produces income during the course of proceedings; or (3) the value of the collateral securing the debt is sufficient to pay both the claim and postpetition interest on the claim. *See, e.g., In re Boston & Maine Corp.*, 719 F.2d 493, 496 (1st Cir. 1983), *cert. denied*, 466 U.S. 938 (1984);[5] *In re Kerber Packing Co.*, 276 F.2d 245, 246 (7th Cir. 1960); *United States v. Bass*, 271 F.2d 129, 130 (9th Cir. 1959); *In re Macomb Trailer Coach, Inc.*, 200 F.2d 611, 613 (6th Cir. 1952), *cert. denied*, 345 U.S. 958 (1953). The third exception above was created pursuant to the theory that postpetition interest should be allowed where a security agreement had been voluntarily executed and the creditor had successfully

[5] While *Boston & Maine Corp.* is a 1983 decision, it interprets pre-Code law.

bargained for specific, valuable collateral to secure the principal obligation. Accordingly, where the creditor had bargained to become an oversecured creditor, he had an expectation of receiving interest were it necessary to sell the security. *See Kerber Packing Co.*, 276 F.2d at 247; *Bass*, 271 F.2d at 132; *United States v. Harrington*, 269 F.2d 719, 724 (4th Cir. 1959).

It was equally well established by at least four courts of appeals that the third exception—allowing the payment of postpetition interest if the claim was oversecured—did not apply to liens which were nonconsensual in nature, such as tax liens, because the underlying reason for the exception did not apply. *See Kerber Packing Co.*, 276 F.2d at 247; *Mighell*, 273 F.2d at 684; *Bass*, 271 F.2d at 131-32; *Harrington*, 269 F.2d at 721-24. *Cf. Boston & Maine Corp.*, 719 F.2d at 497. In such cases the parties had not bargained concerning particular collateral, and the creditor therefore did not have an expectation of receiving interest. One noted distinction between tax liens and contractual liens is that tax liens often apply to all of the debtor's property, whereas consensual liens are specific in nature and attach to only one asset. *Kerber Packing Co.*, 276 F.2d at 247; *Bass*, 271 F.2d 131-32; *Boston & Maine Corp.*, 719 F.2d at 497 n.1.[6]

[6] The First Circuit in *Boston & Maine Corp.* sets forth an additional reason for not applying the third judicially created exception to nonconsensual liens:

> [T]he payment of the interest, which is secured by the lien, is not contemplated by the parties at the beginning of each tax year. Rather, the imposition of interest on unpaid taxes is more in the nature of an enforcement device assuring the collection of delinquent taxes. In the context of an insolvency proceeding, to grant the taxing entity postpetition interest on its tax lien would impose the "enforcement device" not on the insolvent debtor, but on those lower priority creditors whose claims will go unpaid. Such creditors are but innocent bystanders; they could have done nothing to effect the prompt payment of taxes and avoid the im-

In light of the judicial interpretation under the Bankruptcy Act regarding the payment of postpetition interest, Debtor asserts that section 506(b) does nothing more than codify this third exception to the bar against paying postpetition interest. Several bankruptcy courts, and at least one district court and one commentator, have sided with Debtor in concluding that section 506(b) disallows postpetition interest on prepetition nonconsensual secured claims by virtue of the prior judicial interpretation of the Bankruptcy Act. *See, e.g., In re Newbury Cafe, Inc.*, 72 Bankr. 478 (Bankr. E.D. Mass. 1987) (postpetition interest is not mandated under section 506(b)); *In re Dan-Ver Enters., Inc.*, 67 Bankr. 951 (W.D. Pa. 1986) (language is ambiguous and legislative history supports conclusion that Congress intended to codify pre-Code law), *aff'g* 60 Bankr. 568 (Bankr. W.D. Pa. 1986);[7] *In re Granite Lumber Co.*, 63 Bankr. 466 (Bankr. D. Mont. 1986) (in dicta, court notes that section 506(b) codifies preexisting law allowing interest if the agreement so provides); *In re Churchfield*, 62 Bankr. 399 (Bankr. E.D. Mich. 1986);[8] *In re Venable*, 48 Bankr. 853 (Bankr. S.D.

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position of postpetition interest. To penalize these creditors for the bankrupt's inability to pay its taxes on time violates all notions of equity.

719 F.2d at 497. In other words, although an entity's nonconsensual tax lien may be oversecured, the payment of postpetition interest to that entity nonetheless places it at an advantage in comparison to lower priority creditors, which harps back to the original reason for disallowing interest on any bankruptcy claim. This would be particularly evident, it seems, if the tax lien attaches to a large portion of the estate rather than specifically bargained-for collateral.

[7] The district court in *Dan-Ver* titles its discussion section as "The Case of the Capricious Comma," which is an appropriate characterization of the comma in § 506(b) and the conflict it has caused amongst the courts.

[8] As in the instant case, *Churchfield* was reversed by the District Court for the Eastern District Michigan and an appeal was filed in

N.Y. 1985) (statutory language expressly provides that interest can be granted only pursuant to an agreement); *In re Trent*, 42 Bankr. 279 (Bankr. W.D. Va. 1984) (statutory language is ambiguous and legislative intent was to codify pre-Code law); *In re Stack Steel & Supply Co.*, 28 Bankr. 151 (Bankr. W.D. Wash. 1983) (postpetition interest is not allowable on nonconsensual liens, although court fails to mention section 506(b)); 3 *Collier on Bankruptcy* ¶ 506.05 (15th ed. 1987).

Collier on Bankruptcy concludes that section 506(b) "makes express provision for the allowance as part of an allowed secured claim, to the extent the collateral therefor exceeds the amount of such claim and any recovery under section 506(c), interest and reasonable fees, costs or charges *provided for in the governing agreements," id.* at 506-38 (emphasis added), thereby codifying pre-Code case law. *Id.* at n.1. *See also id.* at 506-41. While acknowledging that "[t]here is a split in authority as to whether a statutory entitlement [to postpetition interest] suffices for purposes of section 506(b)," *id.* at 506-41, *Collier on Bankruptcy* concludes that interpreting section 506(b) as disallowing postpetition interest is more in line with pre-Code precedents and is "consistent with the position that the phrase 'provided for under the agreement under which such claim arose' in 11 U.S.C. § 506(b) modifies the phrase 'interest on such claim' which . . . is the preferred position." *Id.* at 506-42 n.5b. Further, this commentator notes that the legislative history does not evidence an intent to change the pre-Code rule. In discussing the grammatical structure of section 506(b) with respect to determining the applicable rate of interest, and in particular the use of the comma to separate the phrase "interest on such claim," *Collier on Bankruptcy* reasons that "[s]uch separation apparently derived from the need the drafters felt to

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this court. A stay pending a decision in the instant case was granted in *Churchfield*.

make clear that interest was to be allowed only to the extent it accrued on the claim (as opposed to any other amount)." *Id.* at 506-43. This commentator notes, however, that a logical explanation for the comma is to allow for postpetition interest on nonconsensual lien claims, although *Collier on Bankruptcy* admittedly is not of that view. *Id.* at n.10.

We are of the opinion that the language of section 506(b), when read in light of the pre-Code judicially created doctrine, codifies the pre-Code law on the issue of allowable postpetition interest. While our interpretation results in a conflict with the Fourth Circuit and with many bankruptcy courts,[9] we are persuaded that our conclusion is correct, particularly in light of the rule of statutory construction enunciated in *Midlantic* and *Kelly*.

We cannot agree with the Fourth Circuit's conclusion that the "plain meaning" of section 506(b) allows for the

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[9] *See, e.g., In re Brandenburg,* 71 Bankr. 719 (Bankr. D.S.D. 1987) (although acknowledging the grammatical ambiguity, court follows *In re Best Repair*); *In re Busone,* 71 Bankr. 201 (Bankr. E.D. N.Y. 1987) (follows *In re Best Repair*); *In re Gilliland,* 67 Bankr. 410, 411 (Bankr. N.D. Tex. 1986) (follows *In re Best Repair,* and reasons that the theory in the pre-Code cases is fundamentally flawed since "[t]he IRS should be no better off nor worse off than any other secured creditor"); *In re Charter Co.,* 63 Bankr. 568 (Bankr. M.D. Fla. 1986) (plain meaning of § 506(b) permits postpetition interest on all oversecured claims); *In re Russo,* 63 Bankr. 335 (Bankr. D. Mass. 1986) (§ 506(b) does not draw distinction between consensual and statutory liens); *In re Henzler Mfg. Co.,* 55 Bankr. 194 (Bankr. N.D. Ohio 1985) (§ 506(b) is not ambiguous and allows postpetition interest on any oversecured claim); *In re Romano,* 51 Bankr. 813 (Bankr. M.D. Fla. 1985) (concludes that § 506(b) authorizes postpetition interest on judgment lien, although court does not provide any analysis); *In re Morrissey,* 37 Bankr. 571 (Bankr. E.D. Va. 1984) (postpetition interest flows from the language of § 506(b)); *In re Loveridge Mach. & Tool Co.,* 36 Bankr. 159 (Bankr. D. Utah 1983) (§ 506(b) applies to all allowed secured claims); *In re Hoffman,* 28 Bankr. 503 (Bankr. D. Md. 1983) (postpetition interest allowed, no analysis provided).

payment of postpetition interest on all allowed oversecured claims, including nonconsensual liens, nor do we agree that our interpretation of the provision "strains the plain meaning of the language and grammar of the provision." *In re Best Repair Co.,* 789 F.2d at 1082. In our view, the Fourth Circuit's conclusion in *Best Repair* is weakened by its subsequent acknowledgment that "§ 506(b) is not so clear that we would not consider its legislative history to aid our interpretation," *id.*, and because it reaches its conclusion without a thorough discussion of pre-Code law, perhaps concluding that pre-Code law is only relevant if the language is ambiguous. In light of *Midlantic* and *Kelly,* we believe such an approach is flawed. Rather, where it is claimed that the Code has significantly altered an existing judicially created concept, courts should review pre-Code law since it may be discovered that the language, when viewed in the proper historical context, is not unambiguous but is actually subject to more than one reasonable interpretation. In the instant case, section 506(b) can be interpreted as incorporating the third judicially created exception to disallowing postpetition interest on prepetition claims, including the limitations placed on that exception by the various circuit courts of appeals.

We conclude that the placement of a comma and the inclusion of the words "and any" do not evince an intention to reject the well-established judicially created concept.[10]

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[10] We do not find the "doctrine of the last antecedent," a statutory construction rule, to mandate an opposite result. While this doctrine does lend some support to the Government's position, *see, e.g., First Charter Fin. Corp. v. United States,* 669 F.2d 1342, 1350 (9th Cir. 1982) ("In construing statutes, qualifying phrases are generally to be applied to the immediately preceding phrase and not to phrases more remote."), we believe that blind resort to such a rule is improper, particularly when applying the rule would require this court to ignore pre-Code law and the statutory construction rule set forth in *Midlantic* and *Kelly*. Further, the phrase "interest on such claim" is not "remote"

The admitted lack of legislative history on this point lends further credence to our position.[11] If Congress intended to depart from pre-Code law with respect to only this one portion of section 506(b), particularly when several courts of appeals were unanimous in their interpretation of the Bankruptcy Act, such an intent must be expressed explicitly and not through the ambiguous use of a comma and the words "and any." *Cf. Egyptian Supply Co. v. Boyd,* 117 F.2d 608, 611 (6th Cir. 1941) (punctuation should be regarded as a "last resort in construing doubtful statutes").

Accordingly, we REVERSE the order of the district court and reinstate the order of the Bankruptcy Court.

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from the qualifying phrase at issue. *Cf. District 6, UMW v. United States Dept. of Interior Bd. of Mine Operations Appeals,* 562 F.2d 1260, 1264-65 & n.17 (D.C. Cir. 1977) (resort to the last antecedent rule found to be improper when the qualifying phrase could modify either the preceding short clause or the preceding main clause, creating an ambiguity).

[11] The Senate Report, the House Report, and statements of the chairmen on the responsible subcommittees do not address the language in section 506(b) referring to interest. Rather the Senate and House Reports only refer to fees, costs and charges:

> Subsection (b) codifies current law by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the agreement under which the claim arose. These fees, costs, and charges aare [sic] secured claims to the extent that the value of the collateral exceeds the amount of the underlying claim.

S. Rep. No. 989, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5854; *see also* H.R. Rep. No. 595, 95th Cong., 2d Sess. 356-57, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6312 (House Report does not have the parenthetical statement included above). The statements of the committee chairmen only explain why the reference to the attorney's fees was eliminated.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1785

IN RE: RON PAIR ENTERPRISES, INC., DEBTOR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RON PAIR ENTERPRISES, INC. d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEFENDANT-APPELLANT

[Filed Sept. 4, 1987]

Before: KENNEDY and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: October 1, 1987

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Chapter 11 Bankruptcy No. 84-01606-G

IN THE MATTER OF:
RON PAIR ENTERPRISES, INC., d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEBTOR

CASE NO. 85-CV-75680-DT

UNITED STATES OF AMERICA, APPELLANT

v.

RON PAIR ENTERPRISES, INC. d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, APPELLEE

[Filed July 2, 1984]

ORDER REVERSING THE ORDER OF THE BANKRUPTCY COURT AND AWARDING POST-PETITION INTEREST TO THE UNITED STATES

This matter having been submitted for a decision by the undersigned, the parties having submitted briefs and it appearing that this Court has jurisdiction to hear and determine this appeal from the ruling of the Bankruptcy Court on the issue of whether the United States is entitled to post-petition interest on its over-secured pre-petition tax claim pursuant to the terms of Section 506(b) of the

Bankruptcy Code, and it appearing that the plain language of Section 506(b) entitles the United States to such post-petition interest, and such an interpretation has been upheld by the United States Court of Appeals for the Fourth and Sixth Circuits in *In re Colegrove,* 771 F.2d 119 (6th Cir. 1985) and *In re Best Repair Company, Inc.*, No. 85-1907 (4th Cir., May 8, 1986);

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that (i) the December 9, 1985 Order of the Bankruptcy Court in Case No. 84-01606-G is reversed; and (ii) the United States, is entitled to post-petition interest on its over-secured pre-petition tax claim pursuant to the provisions of 11 U.S.C., Section 506(b).

DONE and ORDERED this 30th day of June, 1986.

/s/ HORACE W. GILMORE
Horace W. Gilmore
United States District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 84-01606-G
CHAPTER XI

IN THE MATTER OF:
RON PAIR ENTERPRISES, INC., d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY,
DEBTOR.

[Filed December 9, 1985]

MEMORANDUM OPINION AND ORDER DENYING THE OBJECTION OF THE UNITED STATES TO CONFIRMATION OF DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION

AT A SESSION of the United States Bankruptcy Court, held in the Chambers of the Honorable Ray Reynolds Graves, Room 1063 U.S. Courthouse, City of Detroit, County of Wayne, State of Michigan.

Present: The Honorable Ray Reynolds GRAVES,
United States Bankruptcy Judge

The debtor, Ron Pair Enterprises, filed a petition under Chapter 11 of the United States Bankruptcy Code on May 1, 1984. On September 17, 1985, the United States Internal Revenue Service (IRS) filed a proof of claim on its secured claim for prepetition tax liens filed on December 20, 1983 and March 23, 1984. On November 4, 1985 IRS filed a

notice of objection to confirmation of the first amended plan of reorganization of this Chapter 11 debtor.

The debtor and the IRS agree that the debtor currently owes no administrative taxes to the United States, that prepetition federal taxes will be paid through deferred monthly payments upon confirmation of the plan and will bear interest at the rate of 10% per annum, that the IRS has a properly perfected security interest in the debtor's assets amounting to $53,277.93. The parties also agree that the sole issue in this case is the IRS' right to interest on its secured tax claim between the date of the filing of the petition and the date of the confirmation of the plan. (The parties agree that there is sufficient collateral covered by the IRS' properly perfected tax lien to satisfy both the principal secured tax claim and the post-petition pre-confirmation interest accruing on that claim.) 11 U.S.C. § 506(b) does not require payment of interest on the properly perfected tax lien held by the IRS during the post petition pre-confirmation "gap period."

Even if the security for the perfected tax lien is sufficient to pay the interest as well as the principal amount of the claim, interest is not authorized under § 506(b). Five Courts of Appeal have decided this issue. It appears that the clear weight of authority supports the conclusion that the IRS is not entitled to interest on its allowed secured tax claim for the period from the date of the filing of the petition until the order of confirmation of the plan of reorganization. *In re: Kerber Packing Company,* 276 F.2d 245 (C.A. 7, 1960); *United States v Bass,* 271 F.2d 129 (C.A. 9, 1959); *United States v Harrington,* 269 F.2d 719 (C.A. 4, 1959); *United States v Mighell,* 273 F.2d 682 (C.A.2, 1959); and *In re: Boston & Main Corp.,* 719 F.2d 493 (C.A. 1, 1983). This court sees no reason to deviate from the sound reasoning of the various Courts of Appeal that have already disposed of this issue. We also see no reason to change the general rule that interest on pre-

petition claims, both secured and unsecured, stops accruing upon the filing of the petition. *Vanston Bondholders Protective Committee v Green,* 329 US 156 (1946); *City of New York v Saper,* 336 US 328 (1948).

The objection of the United States Internal Revenue Service is DENIED and the previously confirmed plan of this Chapter 11 debtor may be completed without the payment of "gap period" interest on the allowed secured claim of the Internal Revenue Service.

IT IS SO ORDERED.

/s/ RAY REYNOLDS GRAVES
Ray Reynolds Graves
United States Bankruptcy Judge

Dated: 12/6/85

APPENDIX E

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Chapter 11
Case No. 84-01606-G

IN RE: RON PAIR ENTERPRISES, INC., d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEBTOR.

ORDER CONFIRMING FIRST AMENDED PLAN OF REORGANIZATION AS MODIFIED

At a session of said court held in the Federal Building, City of Detroit, County of Wayne, State of Michigan, on [December 3, 1985].

Present: Honorable Ray Reynolds GRAVES,
United States Bankruptcy Judge

The First Amended Plan of Reorganization ("Plan") of the Debtor under Chapter 11 of the Bankruptcy Code having been filed on October 1, 1985, and attached as Exhibit A to the Debtor's Amended Disclosure Statement and thereafter transmitted to creditors; counsel for the Debtor having stated that Michigan National Bank Macomb has withdrawn its objections to Confirmation; that pursuant to an objection filed by the United States of America, Internal Revenue Service ("IRS") and an objection received from the State of Michigan, the interest on the allowed tax claims to be paid the IRS and the State of Michigan has been revised from eight (8%) percent to ten (10%) percent

per annum; that the IRS has withdrawn its remaining objection to the Debtor's Plan for failure to provide interest on the IRS' allowed pre-petition secured claim from the date of the filing of the petition until confirmation, noting that it is not an objection to confirmation but an issue to be decided by the Court after Confirmation on the briefs already submitted; that the Amended Plan should be further modified to include Class X, Charlevoix Development Corporation, an unimpaired secured creditor (land contract vendor) to whom the Debtor will continue to make monthly payments of $170.00 pursuant to the terms of the land contract currently in effect; that the Debtor has filed an Application to Modify First Amended Plan of Reorganization containing the above revisions; and notice having been duly given of a hearing on confirmation of the Plan;

IT IS HEREBY FOUND AND DETERMINED AFTER NOTICE AND A HEARING:

1. That the proposed modifications are not material and do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification and that it therefore be deemed accepted by all creditors and equity security holders who have previously accepted the Plan.

2. The Plan has been overwhelmingly accepted in writing by the creditors and equity security holders whose acceptance is required by law.

3. The Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

4. The proponent of the Plan has complied with the applicable provisions of Chapter 11 of the Bankruptcy Code.

5. The Plan has been proposed in good faith and not by any means forbidden by law.

6. All payments made or promised by the Debtor under the Plan for services or for costs and expenses in

connection with the Plan and incident to the case, have been fully disclosed to the Court and are reasonable, or if to be fixed after confirmation of the Plan, will be subject to the approval of the Court.

7. The identity, qualifications, and affiliations of the persons who are or may be directors or officers or trustees, if any, of the Debtor after confirmation of the Plan have been fully disclosed and appointment of such persons to such offices or their continuance in those offices is equitable and consistent with the interests of the creditors and equity holders and with public policy.

8. The identity of any insider that will be employed or retained by the Debtor and his compensation has been fully disclosed.

9. There are no rate charges over which any regulatory commission will have jurisdiction included in the Plan.

10. Each holder of a claim or interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

11. Each class has accepted the Plan, or the class is not impaired under the Plan.

12. Except to the extent that the Plan provides that all other expenses of administration shall be paid in the ordinary course of business, the Plan provides that with respect to the § 507(a)(1) expense of administration claims of the attorneys for the Debtor, attorneys for the Creditors' Committee and accountants of the Debtor upon allowance by the Court payment will be made in full upon the Confirmation date of the Plan.

13. There are no claims under § 507(a)(2), (4), (5), or (6).

14. Claims under § 507(3) shall receive on account of such claim, cash equal to the allowed amount of such

claim upon the effective date of the Plan.

15. Holders of claims of a kind specified in § 507(a)(7) of the Bankruptcy Code will receive on account of such claim deferred cash payments, over a period not exceeding six (6) years after the date of assessment of such claim, of a value as of the effective date of the Plan, equal to the allowed amount of such claim with interest as provided in the Modified Amended Plan. Any additional interest which may be due the IRS on its allowed pre-petition secured claim covering the interim period from the date of filing of the petition until confirmation will be payable in monthly installments along with the allowed pre-petition secured claim only if the Court enters a final Order adverse to the Debtor's position.

16. Confirmation of the Plan is not likely to be followed by liquidation or the need for further financial reorganization of the Debtor or any successor of the Debtor under the Plan.

17. The objection to confirmation filed by Michigan National Bank Macomb has been withdrawn, as is evidenced by the approval of Michigan National Bank Macomb to entry of this Order.

18. The objection to Confirmation filed by IRS has been withdrawn as is evidenced by the approval of the IRS to entry of this Order.

IT IS HEREBY ORDERED that:

1. The First Amended Plan of Reorganization filed by Debtor, Ron Pair Enterprises, on October 1, 1985, is confirmed as modified herein.

2. The provisions of the Plan bind the Debtor and all creditors and equity security holders of the Debtor, including any person that might acquire equity securities of the Debtor by sale, pledge, foreclosure, or otherwise.

3. This Order of Confirmation shall have the effect set forth in 11 U.S.C. § 1141 and shall invest in the Debtor all of the property of the estate, free and clear of all claims,

liens and interests of creditors and of equity security holders except as otherwise provided in the Plan, documents and other orders executed in connection with this Plan, and in this Order and all holders of claims shall, promptly upon the Order becoming final and non-appealable, provide Debtor with appropriate releases of liens which have been filed of record. Except as otherwise provided in the Plan, documents and other orders executed in connection with the Plan, and in this Order, this Order discharges the Debtor from any debt that arose before the date of such confirmation and any debt of the kind specified in 11 U.S.C. § 502(g), (h) or (i). All creditors whose debts are discharged by this Order are permanently enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the Debtor.

4. This Court, in addition to any specific retention of jurisdiction provided for in the Plan and Disclosure Statement, shall generally retain jurisdiction for the purposes set forth in the Plan and Disclosure Statement.

5. The Objections to Confirmation of Plan filed by Michigan National Bank Macomb and United States of America, Internal Revenue Service be and hereby are withdrawn.

/s/ RAY REYNOLDS GRAVES
U.S. Bankruptcy Judge

APPENDIX F

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

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